widow for life, with remainder to his son in fee, provided that "in the event he should die without definite issue and before this will takes effect," the gift to go over. The son survived the testator but died without issue in his mother's lifetime. The *quantum* of his estate was in issue. The testator, very probably, was unconscious of any contingency which would make the ultimate disposition of his property depend upon the construction of this ambiguous phrase. The primary meaning of "before this will takes effect" is, of course, "before the testator dies." But a secondary meaning, "before the devisee takes possession," is possible. This the court adopted upon three considerations: the same words were used in another connection in such a context as to indicate that the testator employed them in this secondary meaning; in another place in the will he had specifically provided concerning his wife's death before his own in commonplace language, indicating that had he meant his son's death before his own as the contingency, he would have employed such ordinary language, and not technical language, to express it; and the further notion that the testator is presumed to prefer to have the property remain in his family. The other construction would have allowed his wife to have taken. This last reason may be legitimately used in close cases; but it should be used only as a determining rule, analogous to rules of intestacy, and not as a giving effect to the testator's intention. It has been much abused, so that it has come in some instances to militate against a son's widow taking if some construction is possible which will bar her.

It is sincerely to be hoped that the Supreme Court of Illinois will follow the lead it has established in these two cases. Under any scheme, of course, each case must be decided substantially apart from all others; but the bar is given something with which to work far more tangible than a guess as to what the Supreme Court might feel was the fair thing to do as Christian gentlemen. They know that the language used will be given its ordinary and primary meaning unless there are good reasons for accepting a secondary meaning. And they know what facts and circumstances will be weighed by the court to determine which meaning shall prevail. The ultimate decision is a matter of the court's judgment; but it may be known beforehand what considerations will be weighed on either side of the scale.

STATUTORY AUTHORIZATION AND THE LAW OF NUISANCE. — The North Melbourne Tramways Company was authorized by legislative act and municipal regulations made thereunder to operate electric street cars, and was doing so, using the ordinary trolley pole and wire system for distributing current to its cars. One of the safeguards of its system was a ground wire running from an overhead and supposedly uncharged wire to a rail-end. This ground wire was uninsulated and was carried down inside a metal post. An accident to the system charged the overhead wire and so the ground wire and the post. The short circuit arranged by the contact with the rail-end was ineffective because a place in the ground wire was corroded. The plaintiff touched the post and suffered severe burns. When he sued, the jury found that there had been no negligence in the conduct of the defendant's enterprise. Judgment

went for the defendant. The High Court of Australia allowed an appeal and ordered a new trial. *Fullarton* v. *North Meldourne Electric Tramways & Lighting Co. Ltd.*, [1916] Vict. L. R. 231.

The court decides the case by saying that an electrified post standing in the public highway is a nuisance, for whose misdeeds its owners will be liable unless they are protected by the authority under which they operate.[1] This brings up at once the question of the extent of the immunity resulting from a legislative grant of power. On this question rules are as numerous as cases. The truth is that cases are unique; that each case depends on the precise statute under authority of which the defendant operated. A statute may in effect enact absolute liability for accidents, or certain kinds of accidents; [2] it is presumed it may enact complete immunity from liability.[3] Often it is provided that there shall be liability for "nuisances" committed.[4] Often there is no provision about civil liability. Then it is sometimes said that what the legislature has authorized is privileged, and that no action can lie for any of its consequences.[5] Also it is sometimes said that no action but the state's is barred, that the legislature has not meant to touch tort rights at all.[6] Necessarily, however, those tort rights that depend on the fact that the plaintiff has been injured in consequence of the defendant's doing a forbidden (penal) act [7] cease when the act ceases to be forbidden; one cannot recover as for "special injury from a public nuisance" when there is no public nuisance. The legislative grant always has this much effect: it takes away the prior prohibition and raises the thing permitted to the plane of a thing that never was prohibited. On that plane the thing is subject to all the rules of law excepting only that one rule by which it was forbidden.[8] If because of some one of those other rules the defendant would be liable, *primâ facie* he is still so. It then becomes important to determine whether any further immunity was meant to be conferred. The answer to this question is said to depend on whether the power conferred covers specifically what has here been done,[9] on its permissive or mandatory character,[10] on whether it was given for a private or a public

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[1] [1916] Vict. L. R. 231, 246, 255.

[2] Hipkins *v.* Birmingham & Staffordshire Gas Light Co., 5 H. & N. 74, 6 H. & N. 250.

[3] See Hammersmith & City Ry. Co. *v.* Brand, L. R. 4 H. L. 171, 196; POLLOCK, TORTS, 10 ed., 136–38. This statement must of course in this country be limited by the Fifth and Fourteenth Amendments. See *infra*, note 15.

[4] Midwood & Co. Ltd. *v.* Manchester Corporation, [1905] 2 K. B. 597; Charing Cross, etc. Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442, [1914] 3 K. B. 772.

[5] See Vaughn *v.* Taff Vale Ry. Co., 5 H. & N. 679, 685; Hammersmith & City Ry. Co. *v.* Brand, L. R. 4 H. L. 171, 196.

[6] See Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 332.

[7] See E. R. Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 326–28.

[8] The way that this is commonly expressed is by the statement that the legislature shall be deemed to have intended that the authority granted should be exercised only in conformity with the private rights of parties. See Metropolitan Asylum District *v.* Hill, 6 A. C. 193, 201, 208; Baltimore & Potomac R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 331; SALMOND, TORTS, 3 ed., 221.

[9] Metropolitan Asylum District *v.* Hill, 6 A. C. 193; Bohan *v.* Port Jervis Gas Light Co., 122 N. Y. 18.

[10] See Lord Watson, in Metropolitan Asylum District *v.* Hill, 6 A. C. 193, 212; SALMOND, TORTS, 3 ed., 220.

purpose,[11] and finally on inference from the whole language and circumstances of the statute.[12] The language of the principal case, that only acts "necessary, not for their mere occasions but in order that the statutory power might live as an effective authority" [13] are privileged, does not add much to prior statements.[14]

In the United States courts are aided toward finding liability by the Fourteenth Amendment and similar provisions in the constitutions of the states. When the conduct of the defendant's operations, though permitted by authority, is resulting in so serious an injury to the plaintiff's enjoyment of his property that a "taking" is occurring, the defendant must pay for the property so taken.[15] So we have "informal eminent domain proceedings" and the various procedures that in the several jurisdictions vindicate the plaintiff's right.[16]

In the case at bar there clearly was no taking of liberty or property,[17] even if the case had arisen in this country. And liability upon any other of the ordinary rules of law is far from clear. The injury resulted from acts in the course of a permitted business done without negligence and without intentional reference to the plaintiff or any of his property, nor

[11] See Sinnickson *v.* Johnson, 17 N. J. L. 129, 146, 150–53.

[12] Compare the decisions of the two courts in Truman *v.* London, Brighton, & South Coast Ry. Co., 29 Ch. D. 89, and 11 A. C. 45.

Mr. Salmond calls on us to distinguish between "absolute" authority, that is, authority to do the act "notwithstanding . . . that it necessarily causes a nuisance," and conditional authority, that is, authority to do the act "provided it can be done without causing a nuisance." SALMOND, TORTS, 3 ed., § 69. The distinction is sound and necessary, but except in cases where the authority is mandatory or the condition is express, the statement of it gets us little beyond the statement of the primary problem. See however, Bowen, L. J., in Truman *v.* London, Brighton, & South Coast Ry. Co., 29 Ch. D. 89, 108.

[13] [1916] Vict. L. R. 231, 251. The bearing of this upon the facts is this: cars could have been run with the ground wire in the post made safe by insulation. Consequently for using it uninsulated and for injuries resulting through such use no immunity was granted.

[14] That in Metropolitan Asylum District *v.* Hill, 6 A. C. 193, for instance.

A pretty question in this connection not raised often, but suggested by a recent English case, is whether a change in circumstances following a statute can revoke or limit an immunity once given. Hewlett *v.* Great Central Ry. Co., 114 L. T. R. 713. In that case posts standing in the street, and constituting an obstruction of the highway, were authorized as they then stood by Act of Parliament. Then ensued Zeppelin raids and ordinances reducing lights in London. The plaintiff was hurt by collision with one of the posts. The jury were allowed to say that it was negligent for the defendant to maintain the posts after the lighting ordinances without painting them white. *Cf.* The Queen *v.* Bradford Navigation Co., 6 B. & S. 631. Clearly such a change in circumstances affects the decision of our primary question, that is, whether on ordinary rules of law, excluding the rule that posts in a highway are a public nuisance, the defendant would be liable. It would seem, however, that if the legislature has really meant to grant immunity, and if changes in conditions make the grant unwise, the proper remedy is an appeal to the legislature to revoke it. *Cf.* Louisville Bridge Co. *v.* United States, U. S. Sup. Ct., Oct. Term, 1916, No. 540.

[15] Eaton *v.* Boston, Concord, & Montreal R., 51 N. H. 504. See 1 LEWIS, EMINENT DOMAIN, 3 ed., §§ 62–68.

[16] See 2 LEWIS, EMINENT DOMAIN, 3 ed., ch. 27.

[17] A catastrophic and unintended injury can hardly be a "taking"; that word seems necessarily to call for an intentional reference to the plaintiff or his property, which may of course exist in a continuance of operations after it is known that they will hurt the plaintiff as well as in starting them with that knowledge beforehand. Mr. Lewis says that there never is a taking unless there is an injury for which the plaintiff could sue at common law. 1 LEWIS, EMINENT DOMAIN, 3 ed., 57.

to the obstruction in the highway that resulted. Liability is found by calling the electrified post in the highway a public nuisance.[18] The use of that language of course proves very little. Doubtless the post was a nuisance, in the sense that it might be abated and that the defendant was under an obligation to take it down or get the current out of it as soon as possible.[19] But the only purpose of saying "public nuisance" in the law of torts (except in connection with the rule that one who suffers from such a nuisance in common with the rest of the community can *not* recover), is to indicate that the plaintiff has been injured by the defendant's doing of a forbidden thing, for which, therefore, he is liable.[20] Here the defendant has done nothing not permitted. Doubtless if it fails after a reasonable chance to remove or de-electrify the post, it has been derelict, and if then children touch it and are hurt it will be liable. But as we have the case there is nothing but a catastrophic injury happening unexpectedly and without fault from a permitted act. Such injuries have indeed from time to time been termed nuisances, public or private, and liability imposed upon that ground.[21] But the fact that the interest that has been by chance

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[18] See note 1.

[19] Northern Pacific Ry. Co. *v.* United States, 104 Fed. 691. In this case the weight of the defendant railway's roadbed squeezed out a lower viscous stratum which no one knew existed, and so created a reef to the injury of navigation in the Red River of the North. The defendant was ordered to move its railroad or to keep the channel clear.

[20] See note 7.

[21] Midwood & Co. Ltd. *v.* Manchester Corporation, [1905] 2 K. B. 597. In this case an accidental escape of electricity from the defendant's wires volatilized some of the bitumen in which the mains were laid. The gas so generated leaked into the plaintiff's house, took fire, and exploded. The defendant's ordinance provided that it should be liable for nuisances. Collins, M. R., said, p. 605, "If that was not a nuisance, I do not know what would be one." See also Charing Cross, etc. Supply Co. *v.* London Hydraulic Power Co., [1913] 3 K. B. 442, [1914] 3 K. B. 772. Mr. Salmond thinks that the term nuisance should be applied to all escapes of injurious substances. SALMOND, TORTS, 3 ed., 191. But his further analysis is interesting. 'In the case of continuing nuisances it is no defence that all possible care and skill are being used to prevent the operation complained of from amounting to a nuisance. . . . How far damage done accidentally, in the course of an operation which is not thus known to be a necessary source of danger, is any ground of liability in the absence of negligence is a question that will be considered later." SALMOND, TORTS, 3 ed., 199, 200. The later consideration is given in connection with discussion of the case of Fletcher *v.* Rylands, as to which Mr. Salmond's opinion is well known. SALMOND, TORTS, 3 ed., § 62. Professor Bohlen thinks that liability for the escape of injurious substances should be the same whether the escape is gradual or sudden. Bohlen, "The Rule in Rylands *v.* Fletcher," 59 U. PA. L. REV. 298, 312 *et seq.* He cites in support the case of Bell *v.* Twentyman, 1 Q. B. [1 A. & E. (N. S.)] 766, where the defendant, on whose property an obstruction in a watercourse arose without his fault, was held liable for damages done the plaintiff before he knew of the obstruction. Lord Denman said, p. 774, "If the plea had stated that he cleansed and opened the watercourse as soon after the injury as it was possible for him to do it, that would have made no difference." It must be admitted that the decision, and certainly the *dictum* of Lord Denman, is in direct conflict with what we have been urging. Against it must be put all the decisions in the country refusing to follow Fletcher *v.* Rylands, and all the cases before and after Fletcher *v.* Rylands holding that when a milldam breaks suddenly and without fault there is no liability. Inhabitants of Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177; Livingston *v.* Adams, 8 Cow. (N. Y.) 175; Everett *v.* Hydraulic Flume Tunnel Co., 23 Cal. 225. See especially City Water Power Co. *v.* City of Fergus Falls, 113 Minn. 33, 128 N. W. 817, a case in a jurisdiction normally loyal to Fletcher *v.* Rylands; and compare Pixley *v.* Clark, 35 N. Y. 520, in which seepage into the plaintiff's property occurred continually, and where it was properly held that a nuisance existed. For a clear statement of the distinction be-

endangered is common to many members of the community cannot change the ordinary principles of liability for fault.[22] The case is therefore one that can rest only upon *Fletcher* v. *Rylands*.[23] This then is one more situation where an acceptance of that case permits us to arrive at a decision different from the one that would have been arrived at in its absence.[24]

THE TANK CAR CASE. — In 1887, the date of the passage of the Interstate Commerce Act,[1] the purpose of government regulation was the prevention of the exorbitant and discriminatory rates and practices then on the rampage.[2] And the amendatory Hepburn Act of 1906 [3] pretended to do no more than make the original act a more efficient instrument of that purpose. But later, with the increase in commerce and trade, arose a demand for more adequate service. Recently this demand has become more and more insistent. Embargoes by the railroads and complaints by the shippers are making manifest the next point of contact between the railroads and the law. It is more and more clear that the limit of production is fixed by the transportation facilities.[4] Furthermore, it may fairly

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tween catastrophic and continuous escapes of substances, and of the reasons therefor see Jeremiah Smith, "Tort and Absolute Liability," *supra*, p. 324.

[22] The fact that a public interest is invaded by the condition of premises for which the defendant is responsible certainly throws on him a positive obligation to put them into shape, in spite of the fact that the condition arises from some force outside of his control, while it is rather clear that he has no such duty if all that is threatened is a private injury. Compare Y. B. 32 Assis. pl. 10; VINER, ABR. tit. Nusance, A; King *v.* Wharton 12 Mod. 510; Proprietors of Margate Pier & Harbor *v.* Margate, 20 L. T. (N. S.) 564; Attorney-General *v.* Heatley, [1897] 1 Ch. 560; and Northern Pacific Ry. Co. *v.* United States, 104 Fed. 691, with Sparke *v.* Osborne, 7 Comm. L. R. 51, and Reed *v.* Smith, 27 West. L. R. (Can.) 190. See, however, Smith *v.* Giddy, [1904] 2 K. B. 448; Roberts *v.* Harrison, 101 Ga. 773, 28 S. E. 995; 27 HARV. L. REV. 769. Such a distinction can be understood. But no case has been found which says that when defendant has done nothing and omitted nothing he is any more liable for accidents connected with his property when the interest interfered with is common to many persons than when it is not so. Barker *v.* Herbert, [1911] 2 K. B. 633, and Inhabitants of Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177, seem to hold that there is no such distinction.

[23] The court understood this perfectly. In the course of the argument Gavan Duffy, J., inquired, "Is the meaning of the statute that the promoters may run a tramway at their own risk, or that they may run it provided they use reasonable care?" The answer was, "In general the promoters are free from liability if their works are in good order. . . . In the case of damage caused by the escape of electricity their liability goes farther and is absolute." [1916] Vict. L. R. 231, 240. The use of the language of nuisance in connection with this kind of a case is perhaps, in a British jurisdiction, justified by the cases of Midwood & Co. Ltd. *v.* Manchester Corporation, and Charing Cross, etc. Supply Co. *v.* London Hydraulic Power Co., *supra*, note 21.

[24] See E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 802–13. It was apparently at one time thought in English courts that legislative authorization, whatever its effect on liability on other grounds, necessarily negatived liability under Fletcher *v.* Rylands. See Green *v.* Chelsea Waterworks Co., 10 T. L. R. 259. This opinion can hardly now be held.

[1] 24 STAT. AT. L. 379.

[2] See Texas & Pacific Ry. *v.* Interstate Commerce Commission, 162 U. S. 197, 233; New York, New Haven, etc. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 391. See also S. O. Dunn, "The Interstate Commerce Commission," 63 ANNALS AM. ACAD. OF SOC. AND POL. SCI. 155, 159.

[3] 34 STAT. AT L. 584.

[4] See an address by J. J. Hill on the "Need of Greater Railway Facilities," pub-